



[2021] UKFTT 0064 (TC)

TC08049

Income tax - Schedule 36 information notice – failure to comply – penalties – reasonable excuse- appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/ 2019/06531

BETWEEN

MARIA ACOSTA

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE ABIGAIL MCGREGOR

The Tribunal determined the appeal on 5 February 2021 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 9 October 2019 (with enclosures), HMRC's Statement of Case dated 18 June 2020 and the bundle of documents prepared for the Tribunal.

DECISION

INTRODUCTION

1. This is an appeal against daily penalties for failure to comply with an information notice issued under Schedule 36 to Finance Act 2008.

LATE APPEAL

Miss Acosta's appeal to the Tribunal was late. HMRC's Statement of Case sets out they do not raise any objection to the admission of the late appeal. Given HMRC's agreement and the short period of delay in making the appeal, I conclude that it is in the interests of justice to allow the late appeal.

FINDING OF FACTS

2. Miss Acosta submitted her tax return for the 2015-16 tax year on 16 November 2016.
3. HMRC opened an enquiry into that return under section 9A of the Taxes Management Act 1970 on 28 July 2017. As part of that enquiry, HMRC informally requested information and documents from Miss Acosta with a deadline of 1 September 2017.
4. On 4 September 2017, Miss Acosta's agent submitted some, but not all, of the information and documents requested.
5. After some further correspondence between the parties and some further submission of information, HMRC, on 30 May 2018, again requested the outstanding information and told Miss Acosta that it was considering applying to the Tribunal for approval of a formal information notice and asking Miss Acosta if she wished to make representations that would be provided to the Tribunal, with a deadline of 30 July 2018.
6. Miss Acosta provided such representations on 26 June 2018.
7. On 4 September 2018, the Tribunal approved the information notice that was subsequently issued to Miss Acosta. The notice was signed by Judge Kempster and Paul Reynard, Inspector of Taxes, on 4 September 2018. The due date for compliance with the notice was 16 October 2018.
8. HMRC sent a letter to Miss Acosta on the same date, stating that the notice had been approved by the Tribunal, after the Tribunal had considered her representations, that day and enclosing the notice.
9. The notice issued on 4 September 2018 included the heading "This notice has been approved by the tribunal". The cover page for the notice, which contains boxes to be filled out with the issuing officer's signature, name and role and the Tribunal member's name and signature as well as the dates of both signatures, was however left blank.
10. On 26 October 2018, Miss Acosta's new agents wrote to HMRC asking for a 14 day extension of time as they had taken over the case.
11. On 3 December 2018 HMRC wrote to Miss Acosta's agents stating that unless a response was received by 10 December 2018, a £300 penalty would be charged.
12. On 18 December 2018, HMRC issued a £300 penalty. It also set a new deadline of 29 January 2019 for the receipt of the information and documents and stating that if this deadline was missed further penalties of up to £60 per day may be charged.
13. On 28 January 2019, Miss Acosta's agent sent a letter to HMRC including some of the remaining information but stating that the bank statements had been redacted to remove some personal information and setting out certain categories of information that Miss Acosta did

not have. It also set out that the delay in response had been due to the agent's treatment for cancer and that he did not wish Miss Acosta to be penalised for that.

14. The £300 penalty was paid and is not part of this appeal.
15. On 27 March 2019, HMRC wrote to Miss Acosta and her agent:
 - (a) Stating that the redacted bank statements were not sufficient – full unredacted bank statements were required as set out in the information notice dated 4 September 2018;
 - (b) Requesting Miss Acosta to submit the information that the previous letter stated she had access to but had not included; and
 - (c) Requesting Miss Acosta to take steps to obtain the other information that she said she didn't have.
16. Some further information and correspondence was provided to HMRC on 27 June 2019 and again on 5 July 2019.
17. On 18 July 2019, HMRC identified two categories of information requested under the information notice that remained outstanding:
 - (a) Unredacted bank statements for the relevant period; and
 - (b) Copies of correspondence between Miss Acosta and Aston Chester Limited and any other entities introduced to her by Aston Chester Limited for the duration of her employment by them.

This letter gave a deadline of 1 August 2019 and, again, stated, that daily penalties of up to £60 per day could be charged from the date of the previous penalty notice (being 18 December 2018).
18. HMRC chased the agents on 2 August 2019 and an officer attempted to call Miss Acosta on 13 August 2019 but was disconnected by a call screening service once stating her name and that she was from HMRC.
19. On 19 August 2019, HMRC issued a penalty notice charging penalties of £20 per day for the 244 days between 19 December 2018 and 19 August 2019. This amounts to £4,880. The penalty notice appended the original schedule of information and documents required, highlighting in yellow the two categories of information that remained outstanding
20. Miss Acosta submitted an appeal against the penalty notice on 9 October 2019.
21. Further findings of fact are made within the discussion below where they are relevant to particular elements of the appeal.

LAW

22. The information notice was issued by HMRC under the powers given in schedule 36 to Finance Act 2008. Paragraph 1 of Schedule 36 provides:

- (1) An officer of Revenue and Customs may by notice in writing require a person (“the taxpayer”)—
 - (a) to provide information, or
 - (b) to produce a document,if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.

23. Paragraph 3 provides for, amongst other things, obtaining approval for an information notice:

(2) An officer of Revenue and Customs may ask for the approval of the tribunal to the giving of any taxpayer notice or third party notice (and for the effect of obtaining such approval see paragraphs 29, 30 and 53 (appeals against notices and offence)).

24. Paragraph 6 sets out the requirements for the notice:

(1) In this Schedule, “information notice” means a notice under paragraph 1, 2, 5 or 5A.

(2) An information notice may specify or describe the information or documents to be provided or produced.

(3) If an information notice is given with the approval of the tribunal, it must state that it is given with that approval.

(4) A decision of the tribunal under paragraph 3, 4 or 5 is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).

25. Paragraph 7 sets out the compliance requirements including:

(1) Where a person is required by an information notice to provide information or produce a document, the person must do so—

(a) within such period, and

(b) at such time, by such means and in such form (if any),

as is reasonably specified or described in the notice.

26. Part 4 of Schedule 36 sets out restrictions on the scope of information notices, including:

18. An information notice only requires a person to produce a document if it is in the person's possession or power.

19.

(1) An information notice does not require a person to provide or produce—

(a) information that relates to the conduct of a pending appeal relating to tax or any part of a document containing such information, or

(aa) information that relates to the conduct of a pending appeal under the Savings (Government Contributions) Act 2017 or any part of a document containing such information, or

(b) journalistic material (as defined in section 13 of the Police and Criminal Evidence Act 1984 (c 60)) or information contained in such material.

(2) An information notice does not require a person to provide or produce personal records (as defined in section 12 of the Police and Criminal Evidence Act 1984) or information contained in such records, subject to subparagraph (3).

(3) An information notice may require a person—

(a) to produce documents, or copies of documents, that are personal records, omitting any information whose inclusion (whether alone or with

other information) makes the original documents personal records (“personal information”), and

(b) to provide any information contained in such records that is not personal information.

27. Paragraph 29 sets out appeal rights against information notices and restrictions on such rights:

29—

(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.

(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.

(3) Sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 3.

28. Paragraphs 39 and following deal with penalties and provide (to the extent relevant to this appeal:

39—

(1) This paragraph applies to a person who—

(a) fails to comply with an information notice, or

(b) deliberately obstructs an officer of Revenue and Customs in the course of an inspection under Part 2 of this Schedule that has been approved by the tribunal.

(2) The person is liable to a penalty of £300.

(3) The reference in this paragraph to a person who fails to comply with an information notice includes a person who conceals, destroys or otherwise disposes of, or arranges for the concealment, destruction or disposal of, a document in breach of paragraph 42 or 43.

40—

(1) This paragraph applies if the failure or obstruction mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure or obstruction.

(2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure or obstruction continues.

45—

(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or [(on an appeal notified to the tribunal) the tribunal]¹ that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.

(2) For the purposes of this paragraph—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and

(c) where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased.

46—

(1) Where a person becomes liable for a penalty under paragraph 39, 40 or 40A

(a) HMRC may assess the penalty, and

(b) if they do so, they must notify the person.

(2) An assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3).

29. Paragraph 47 makes provision for appeals against penalties:

47

A person may appeal against any of the following decisions of an officer of Revenue and Customs—

(a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or

(b) a decision as to the amount of such a penalty.

30. Paragraph 48 provides the powers of this tribunal in such an appeal:

On an appeal under paragraph 47(a), that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(b), that is notified to the tribunal, the tribunal may—

(a) confirm the decision, or

(b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.

31.

PARTIES' ARGUMENTS

Taxpayer's arguments

32. The notice of appeal submissions can be summarised as follows:

(a) The appeal is not against the substance of the notice, but the decision to impose daily penalties;

(b) The Commissioners have not:

(a) set out their case in any necessary detail;

(b) issued a decision to the Appellant save for the decision to apply penalties "for some £300 per day";

(c) disclosed sufficiently the relevance of their "copious and far-reaching documentary requests".

(c) Miss Acosta has been trying to locate documents and information since the issuing of the notice, but “is concerned about the potential reputational damage resulting from these broad and unfocused enquires”;

(d) The information notice should never have been issued as it was because there had been a complete lack of proper disclosure from the Commissioners;

(e) It cannot be right that “the appellant is penalised for actions/errors unspecific by the Commissioners, and at the rate of £300 per day”; and

(f) “The Commissioners have not made out their case that the arrangements entered into by the Appellant (on the basis of the best available advice) were somehow irregular or improper”.

33. Miss Acosta further noted that the information notice issued “was not signed by either the issuing officer or the Tribunal Judge/Member”, before saying that she is “setting that aside”.

HMRC arguments

34. HMRC’s arguments can be summarised as follows:

(a) The information notice was valid and received by the appellant, in particular:

(a) It was approved by the Tribunal (by Judge Kempster)

(b) It was issued on 4 September 2018; and

(c) Although an unsigned copy of the notice was issued due to an administrative error, this does not invalidate the notice because it had in fact been authorised for issue;

(b) There were two categories of information that remained outstanding at the date of the penalties were issued:

(a) Full, original bank statements for the period of the appellant’s employment with Aston Chester Limited until one month after the last date of employment; and

(b) Copies of any correspondence between the appellant and Aston Chester Limited from the date of her first communication with them until the appellant had been employed by them for 3 months (or the end of employment if sooner);

(c) The daily penalties were validly issued because:

(a) The failure to provide this information continued after the issue of the first penalty notice;

(b) The penalty was applied from 19 December 2018 (the day after the first penalty notice) until 19 August 2019, which amounts to 244 days and was set at £20; and

(d) The appellant has not shown that she had a reasonable excuse for the failure to comply because:

(a) She has not provided any evidence or other information explaining why she has a reasonable excuse; and

(b) While the relevant reasonable excuse cannot run from an earlier date than the issue of the information notice itself, the appellant had in fact been aware of the need for the information and documents since July 2017 and that this reinforces her lack of reasonable excuse; and

(e) The outstanding documents are not excluded from the application of the information notice:

(a) By paragraph 18 of Schedule 36, which states that an information notice only requires a person to produce a document if it is in the person's possession or power. HMRC submit that:

(i) since Miss Acosta has been able to provide redacted bank statements, she must have the whole bank statements in her possession; and

(ii) since Miss Acosta has been able to provide PDFs of email correspondence, she must have access to the originals in order to supply the attachments as well as the email itself; or

(b) By paragraph 19 of Schedule 36, which states that an information notice does not require the person to provide or produce "personal records" within section 12 of the Police and Criminal Evidence Act 1984. HMRC submit that Miss Acosta has not met the burden of proof to show that:

(i) Items of expenditure on her bank statements; or

(ii) Correspondence between her and Aston Chester Limited

Met the statutory definition of "personal records".

DISCUSSION

Was the information notice validly issued?

35. Paragraph 6 of Schedule 36 requires that "If an information notice is given with the approval of the tribunal, it must state that it is given with that approval".

36. As noted in the findings of fact above, HMRC sent Miss Acosta a letter on 4 September 2018. The covering letter explained that it encloses a notice and that the notice has been approved by the Tribunal on 4 September 2018. The enclosed notice has a heading in bold text: "This notice has been approved by the Tribunal". It also goes on to explain the consequences of not complying with it and that it is not possible to appeal against it. The schedule of documents and information is attached to the notice.

37. While it is certainly regrettable that an unsigned copy of the notice was provided to the appellant, the requirements of paragraph 6 do not include that the notice must be signed, only that it must state that it has been approved.

38. Given the notice issued meets the statutory requirements and Miss Acosta and her adviser were well aware that it been considered by the Tribunal, since they made full representations as they are entitled to by law; and I have found as a matter of fact that it was approved by the Tribunal, I find that that information notice was validly issued.

Did the appellant fail to comply with the notice?

39. In order to consider this question, there are two separate issues to consider:

(a) Are there any pieces of information or documents that remained outstanding at the date of the issuing of the penalties under appeal, ie 19 August 2019; and

(b) Are the documents that remained outstanding actually documents that can be required under an information notice?

40. The documents that HMRC identified (in their letter accompanying the penalty notice) as being outstanding were:

(a) Full, original bank or building society statements for any account held in your name, including any joint account, building society account or savings account for the period of your employment with Aston Chester Ltd for the period covering your first date of employment with Aston Chester Ltd until 1 calendar month after your last date of employment with them.

(b) A copy of any correspondence between you and Aston Chester Ltd from the date of your first communication with them until you had been employed by them for 3 months, or until the end of your employment with them if sooner.

41. From the bundle of evidence provided, I find that:

(a) Miss Acosta had not provided “Full original bank statements” as set out in the information notice. She had provided an extract from her online banking for transactions with two specific descriptions: “Vantage” and “Wise”.

(b) Miss Acosta had not provided copies of all correspondence between herself and Aston Chester Ltd. She had provided some of this correspondence but:

(a) Had done so in PDF form without the necessary attachments; and

(b) Had explicitly excluded some correspondence that she had identified as being “personal” in nature.

42. Therefore Miss Acosta has not provided all of the information and documents that were required by the information notice as set out.

43. However, before concluding that there has been non-compliance, I must also consider whether the missing documents are documents that can be required under an information notice in accordance with the statutory provisions.

44. The first possible reason why the documents may not be required is if they are not within the possession or power of the person. As noted above HMRC asserts that given the amount of information that Miss Acosta has been able to submit, ie extracts of bank statements and PDFs of email correspondence, she must have the full documents within her possession or power.

45. Miss Acosta’s notice of appeal was silent as to whether the documents were within her power or possession.

46. I agree with HMRC that it can be inferred from the documents already provided that the outstanding documents are within Miss Acosta’s power or possession and therefore are not excluded by paragraph 18 of Schedule 36.

47. The second possible reason why the documents may not be required is if they are ‘personal records’. That term is defined, in paragraph 19(2) of Schedule 36 by reference to section 12 of the Police and Criminal Evidence Act 1984, which reads:

“personal records” means documents concerning an individual who can be identified from them and relating –

(a) To his physical or mental health

(b) To spiritual counselling or assistance given to or to be given to him; or

(c) To counselling or assistance given or to be given to him for the purposes of his personal welfare, by any voluntary organisation or by any individual who-

- (i) By reason of his office or occupation has responsibilities for his personal welfare; or
- (ii) By reason of an order of a court has responsibilities for his supervision.

48. Miss Acosta has not, in her notice of appeal or the various letters between her adviser and HMRC, asserted that the personal information that she is protecting falls into this specific protected category.

49. Paragraph 19(3) of Schedule 36 specifically requires that an information notice may require a person to provide redacted versions of documents, ie excluding the specific elements that are personal records and to provide any information contained in the documents that is not personal information.

50. Given the information notice requires full original bank statements and copies of all the relevant correspondence, the burden is on Miss Acosta to show that the information or documents requested are personal records, as defined. She has not done so.

51. On this basis, I find that that has been non-compliance with the information notice which persisted until, at least, 19 August 2019.

Was the penalty notice validly issued?

52. Daily default penalties can be issued under paragraph 40 of Schedule 36 if a failure to comply with an information notice continues after the date on which a penalty is imposed under paragraph 39 in respect of the failure.

53. In this case, the penalty imposed under paragraph 39 (ie the £300 penalty initially raised) related to the same failure as that identified in the penalty notice for the daily default penalties.

54. Under paragraph 40(2) the person is liable to a penalty not exceeding £60 for each subsequent day on which the failure continues.

55. HMRC has raised a penalty of £20 for each day from 19 December 2018 (the day after the £300 penalty was charged) until 19 August 2019.

56. The setting of the penalty at £20 per day is addressed in the witness statement (dated 4 June 2020) of Miss Wendy Rosier, the officer of HMRC who issued the penalties. Miss Rosier states that the amount of £20 was authorised by the scheme technical lead within HMRC on the basis that although the total tax at stake is relatively large, a higher penalty amount would be more than 10% of the total liability. She also stated that the £20 figure was considered to be high enough to encourage compliance and to highlight that the tribunal approved notice route was not taken lightly.

57. Under paragraph 46 of Schedule 36, when a person becomes liable to a penalty under paragraph 39 or 40, HMRC may assess the penalty and if they do, they must notify the person within 12 months of the date they became liable to the penalty.

58. In this case, HMRC has assessed the penalty and notified the person within the appropriate 12 month time frame, by virtue of the penalty notice sent to Miss Acosta on 19 August 2019.

59. I note that Miss Acosta's notice of appeal suggests that the level of the penalty was £300 per day and that this was very high. The penalty charged is £20 per day, not £300 per day. The notice of the penalty makes it clear that it is charged at £20 per day and I can confirm that the total amount on the notice has been correctly calculated as such.

60. Where a penalty has been appealed to the Tribunal, I have the power under paragraph 48 of Schedule 36 to confirm or cancel the decision to assess the penalty; and may, in regards to the amount of the penalty, affirm the amount or substitute another decision that the officer of HMRC had the power to make.

61. As to the decision to assess the penalty, I find that the statutory conditions to impose the penalty had been met and confirm the assessment of the penalty.

62. As to the amount of the penalty, I note the frequent chasers and reminders to Miss Acosta and her advisers to provide the information requested and that these requests were, successively, narrowed down as further information was forthcoming. I also take Miss Rosier's witness statement into account, which was not challenged, which showed that HMRC had considered the amount of the penalty in the specific context of Miss Acosta's case. I therefore conclude that a penalty of £20 a day was a reasonable decision to come to and I affirm the amount of the penalty at £20 per day.

Did Miss Acosta have a reasonable excuse?

63. The submissions made by Miss Acosta in the notice of appeal (as summarised above) do not directly relate to whether she had a reasonable excuse, as that term is defined by statute and case law.

64. Despite expressly acknowledging that she cannot appeal against the information notice itself, the nub of the arguments submitted is that she does not think that the information notice should have been issued and that she believes the commissioners for HMRC have not made out their case against her.

65. As previously stated, this appeal only relates to the penalties and not to the issuing of the notice itself (which was approved by the Tribunal) or to anything related to the underlying subject matter of HMRC's enquiry, which may or may not be the subject of a future case before the Tribunal depending on the outcome of the enquiry.

66. However, there is one element of these submissions that might be considered relevant to a question of reasonable excuse. She submits that she has been penalised for "actions/errors unspecific". If that statement was intended to refer to the daily penalties being imposed for non-compliance with the information notice (which is not clear in the Notice of Appeal, but I will assume so for the purposes of this decision), then I do not accept that argument. The notice of penalties (and indeed a number of earlier pieces of correspondence that forewarned of the possibility of daily penalties) makes it very clear that the penalties are being imposed for failing to submit specific categories of documents within the timeframes set out. In the case of the penalty notice, the relevant items are highlighted in yellow so as to make the particular failures very clear.

67. The only ground of the appeal that relates to Miss Acosta's actions is the statement that she had been endeavouring to locate documents and information since the issuing of the notice but is concerned about the potential reputational damage resulting from broad and unfocused enquiries.

68. It is undoubtedly true that Miss Acosta had been endeavouring to obtain information and documents throughout the process, as evidenced by the fact that, by the time of the issuance of the penalties, only two categories of information remained outstanding. However, the setting of deadlines for the information to be provided is a necessary step in the proper and timely conclusion of an enquiry. The information and documents were requested on 4 September, with a deadline of 16 October 2018, but remained outstanding on 19 August

2019. Whether her reputation may be damaged by HMRC’s enquiries is not a matter that is relevant to whether she had a reasonable excuse for her non-compliance.

69. As set out in Upper Tribunal, in *Christine Perrin v HMRC* [2018] UKUT 0156, I must take a three-step approach to considering whether Miss Acosta has a reasonable excuse:

- (a) First, establish what facts the taxpayer asserts give rise to a reasonable excuse;
- (b) Second, decide which of those facts are proven; and
- (c) Third, decide whether, viewed objectively, those proven facts do amount to an objectively reasonable excuse for the default, eg by asking the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”.

70. The burden of proof is, by virtue of paragraph 45(1) of Schedule 36 to FA 2008, on Miss Acosta to satisfy the Tribunal that she had a reasonable excuse for her failure to comply with the information notice.

71. There is very little in the grounds of appeal that might even amount to an assertion from Miss Acosta as to what she believes is her reasonable excuse. I could infer from the statement about her endeavouring to find the documents and information that she asserts that her excuse is that she is trying her best but has not managed to complete the task.

72. Even if I make that inference, she has not proved that fact. The fact that she was able to produce extracted reports of her bank records and PDFs of email correspondence would in fact support the conclusion that she had succeeded in obtaining the information but had chosen to provide it in such a way that only part of it was available to HMRC.

73. For these reasons, I find that Miss Acosta did not have a reasonable excuse for her failure to comply.

CONCLUSION

74. For the reasons set out above, I confirm the penalty assessment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

75. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

RELEASE DATE: 09 MARCH 2021